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12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14 * * *

15 BRANCH BANKING AND TRUST
COMPANY, a North Carolina banking
16 corporation,
17 Plaintiff,

18 vs.
19 PEBBLE CREEK PLAZA PAD, LLC, a
Nevada limited liability company, YOEL INY;
20 NOAM SCHWARTZ; YOEL INY, Trustee of
the Y&T INY FAMILY TRUST dated June 8,
21 1994; NOAM SCHWARTZ, Trustee of the
NOAM SCHWARTZ TRUST dated August 19,
22 1999; D.M.S.I., L.L.C., a Nevada limited
liability company; and DOES 1 through 10,
23 inclusive,

24 Defendants.

25
26 CASE NO. 2:12-cv-01736-LRH-CWH
REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO
COMPEL RESPONSES TO
WRITTEN DISCOVERY

27
28 Defendants, PEBBLE CREEK PLAZA PAD, LLC, a Nevada limited liability company,
YOEL INY; NOAM SCHWARTZ; YOEL INY, Trustee of the Y&T INY FAMILY TRUST
dated June 8, 1994; NOAM SCHWARTZ, Trustee of the NOAM SCHWARTZ TRUST dated

1 August 19, 1999; and D.M.S.I., L.L.C., a Nevada limited liability company (collectively
 2 "Defendants"), by and through their attorneys at the law firm of Kolesar & Leatham ("K&L"),
 3 hereby submit their Reply in support of the Motion to Compel Responses to Written Discovery
 4 [Doc. 55], filed on September 17, 2014. This Reply is made and based upon the attached
 5 Memorandum of Points and Authorities and, the papers and pleadings on file herein, and any
 6 oral argument the Court may entertain in the premises.

7 DATED this 16th day of October, 2014.

8 **KOLESAR & LEATHAM**

9 By 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

16 Defendants filed the Motion to Compel because Plaintiff BRANCH BANKING AND
 17 TRUST COMPANY ("Plaintiff" or "BB&T") has refused to fully respond to numerous
 18 discovery requests that relate to the acquisition of the subject loan and the consideration paid for
 19 the same. This evidence is relevant in this case, as Plaintiff is seeking a deficiency judgment
 20 against the Defendants based on Nevada's deficiency legislation. As part of Plaintiff's burden of
 21 proof, NRS 40.459(1)(c) requires that Plaintiff establish the amount of consideration paid for the
 22 loan. For that reason, Defendants have sought discovery on this issue.

23 Specifically, NRS 40.459(1)(c) was amended by AB 273, which was signed into law as
 24 of June 10, 2011. The Nevada Supreme Court has held that NRS 40.459(1)(c) does not apply to
 25 cases where the foreclosure sale occurred before June 10, 2011, because the Nevada legislature
 26 did not intend the statute to be retroactive. *See Sandpointe Apartments, LLC, et al. v. The Eighth*

1 *Judicial District Court, et al.*, 129 Nev. Adv. Op. 87, 313 P.3d 849, 853–59 (2013). It has been
2 subsequently concluded by a federal district court that NRS 40.459(1)(c) does not apply
3 retroactively to assignments of debt predating the effective date of the AB 273, as the statute's
4 application to such an assignment would violate the Contract Clause. *See Eagle SPE NV I, Inc.*
5 *v. Kiley Ranch Cmtys., et al.*, No. 3:12-cv-00245-RCJ-WGC, 2014 WL 1199595, at *3–19
6 (D.Nev. Mar.24, 2014). The *Kiley* court further concluded that “NRS section 40.459(1)(c)
7 applies only where the assignment at issue occurred on or after the effective date of that statute.”
8 *Id.*

9 The Honorable Miranda Du recently issued a decision on August 5, 2014 in a federal
10 district court action, captioned *Eagle SPE NV I, Inc. v. Southern Highlands Development Corp.*
11 *Eagle SPE NV I, Inc. v. Southern Highlands Development Corp*, 2014 WL 3845420, No. 2:12–
12 cv–00550–MMD–PAL., (D. Nev. Aug. 5, 2014) addressing AB 273. Judge Du granted
13 Defendants' Motion to Dismiss in *Southern Highlands* because both the date of the foreclosure
14 and the date of the operative assignment at issue were subsequent to June 2011, the effective date
15 of NRS 40.459(1)(c). Therefore, based on the recent holdings in other federal district court
16 actions related to AB 273, it can be concluded that when the assignment and the foreclosure take
17 place after the effective date of AB 273, then the provisions of NRS 40.459(1)(c) are applicable
18 to such a case. However, there is no binding decision from the Nevada Supreme Court that
19 resolves the issue of whether the date of the assignment affects whether AB 273 is applicable to
20 a deficiency action.

21 Even though there is no law that prohibits the discovery on the consideration paid issue,
22 Plaintiff has elected to provide incomplete or evasive responses to the discovery requests at issue
23 in Defendants' Motion. Plaintiff's response to the Motion does not address any of the discovery
24 requests individually. Instead, Plaintiff asserts that all the requests seek irrelevant evidence
25 because the alleged assignment of the loan pre-dates the effective date of the amendments of
26 NRS 40.459(1)(c). Plaintiff's objection assumes facts that have not been established and it relies
27 non-binding legal authority that should not prevent discovery on a potentially dispositive issue in
28 this case.

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1 As set forth below, Plaintiff has failed to set forth adequate reasons to deny Defendants'
 2 Motion to Compel, and thus Defendants respectfully request that an order be entered requiring
 3 Plaintiff to provide full and complete responses to each of the discovery requests at issue in the
 4 Motion.

5 **II. LEGAL ARGUMENT**

6 **A. The holding in *BB&T v. Sossaman* and *BB&T v. Pebble Creek* are not
 7 binding on this case, and should not prevent discovery regarding issues
 related to Plaintiff's deficiency action.**

8 Plaintiff exclusively relies on the holdings from non-binding federal cases in arguing that
 9 the amended provisions of NRS 40.459(1)(c) are irrelevant. While these holdings may be looked
 10 upon by a court as persuasive authority in a dispositive motion, they do not bar Defendants from
 11 propounding discovery requests that may lead to the discovery of admissible evidence in this
 12 case. Plaintiff specifically cites to *Branch Banking & Trust Co. v. Pebble Creek Plaza, LLC*,
 13 2:12-CV-01737-LRH, 2014 WL 4635744 (D. Nev. Sept. 15, 2014) and *Branch Banking & Trust
 Co. v. Sossaman & Guadalupe Plaza, LLC*, 2:12-CV-01775-LRH, 2014 WL 4636388 (D. Nev.
 14 Sept. 15, 2014). In both of these cases, the court relied on the holding in *Kiley* in order to
 15 support its finding that NRS 40.459(1)(c) was not applicable to the subject loans. However,
 16 these opinions are not final judgments and Plaintiff has not established that they are binding legal
 17 authority or have any issue preclusion effect on the case at bar.¹ Therefore, the issue of whether
 18 the assignment date of a loan determines the applicability of AB 273 is undecided for this case,
 19 and thus discovery on NRS 40.459(1)(c) related defenses must be permitted. If the discovery is
 20 not allowed, then there will be an incomplete record for the trial in this case (and any potential
 21 appeal by the parties).

22 In sum, the only binding legal authority before this Court is the *Sandpointe* decision
 23 which essentially supports the conclusion that AB 273 defenses may be available in deficiency
 24 actions where the foreclosure took place after the effective date of AB 273. In this case, it is
 25 undisputed that the foreclosure took place in 2012, and thus discovery on AB 273 defenses
 26

27
 28 ¹ Moreover, the defendants in those cases have filed motions to amend or alter the holding by the court
 pursuant to FRCP 59.

1 should be permitted. As a result, an order compelling discovery responses is appropriate in this
 2 matter.

3 **B. If persuasive legal authority is considered, then Defendants' Motion should
 be granted as there is evidence in this case that the assignment took place
 after the effective date of AB 273. The holding in *Southern Highlands*
 supports the conclusion that the consideration paid limitations would be
 applicable in this case.**

6 If this Court considers persuasive legal authority from other federal court cases, then
 7 Defendants respectfully request that the holding in *Southern Highlands* be applied. In that case,
 8 Judge Du found that BB&T/Eagle's "reliance on *Kiley Ranch* is misplaced because [*Southern*
 9 *Highlands*'] timeline demands a different conclusion and does not implicate the Contract Clause
 10 in any way." 2014 WL 3845420, at *5. The *Southern Highlands* court held that the foreclosure,
 11 the assignment and the consideration paid at issue were subsequent to the AB273's effective date
 12 of June 2011 and, therefore, there was no constitutional violations in applying NRS 40.459(1)(c)
 13 consideration paid limitations. The same is true in this action (or at minimum, the operative facts
 14 are in dispute, and thus discovery should be allowed on the consideration paid issue).

15 First, as mentioned in the Complaint, the foreclosure took place on June 21, 2012, which
 16 is after the effective date of AB 273. Judge Du held "[b]ecause the foreclosure sale in this case
 17 occurred after the statutory amendment became effective, applying Subsection (1)(c) would have
 18 no retroactive effect. See *Sandpointe Apartments*, 313 P.3d at 851 (finding that the limitations in
 19 Subsection (1)(c) apply to sales that occurred on or after the statute's effective date (June 10,
 20 2011))." 2014 WL 3845420, at *4. Judge Du's conclusion is in congruence with the Nevada
 21 Supreme Court's application in *Sandpointe* decision.

22 Second, the assignment from the FDIC to BB&T occurred on September 28, 2011. See
 23 Assignment of Security Instruments, Notes and Other Loan Documents, attached as Exhibit 4 to
 24 the Complaint [Doc. 1]. In *Southern Highlands*, Judge Du held, "Plaintiff's reliance on *Kiley*
 25 *Ranch* is misplaced because this case's timeline demands a different conclusion and does not
 26 implicate the Contract Clause in any way." *Id.* Further, Judge Du noted "[i]n *Kiley Ranch*, the
 27 assignment in question from BB & T to Eagle occurred before the effective date of Subsection
 28 (1)(c)...However, in dicta, Judge Jones aptly noted that "[t]he application of the statute to post-

enactment assignments presumably does not suffer from the same infirmity.” *Id.* (internally citations omitted). Judge Du then analyzed the timing of the particular assignment at issue in *Southern Highlands*, the November 8, 2011 assignment:

Turning to the assignment from BB&T to Eagle, the Contract Clause simply has no application because the assignment occurred after Subsection (1)(c) was enacted. Based on the allegations in the Complaint, at enactment, there was no agreement between Eagle and BB&T; therefore, as alleged, Eagle had no rights and responsibilities for the statute to impair. Accordingly, any application of Subsection (1)(c) to the assignment at issue would be prospective, not retroactive, and would not implicate the Contract Clause.

Id. at *6. In other words, the timing of the assignment is at the heart of whether or not Subsection (1)(c) applies.

While here there is no assignment from BB&T to a separate and distinct entity, there is an assignment from the FDIC to BB&T regarding the Pebble Creek Loan that evidences, in a notarized and recorded writing, an AB 273 *post-enactment* assignment. *See Exhibit 4* to Complaint. On September 28, 2011 the FDIC executed an assignment to BB&T for the Pebble Creek Plaza Pad Loan (“Specific Assignment”), which states in relevant part: :

That the FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for Colonial Bank (“Assignor”) . . . for and inconsideration of the sum of TEN AND NO/100 DOLLARS (\$10.00), and other good and valuable consideration received from or on behalf of Branch Banking And Trust Company, a North Carolina banking corporation, (“Assignee”), . . . does hereby grant, bargain, sell, assign, transfer and set over unto Assignee all of Assignor’s rights, title and interests in and to those certain documents set forth on Exhibit A.

...

IN WITNESS WHEREOF, **this Assignment of Security Instruments is executed this the 28th day of September, 2011**, to be deemed effective as of the 14th day of August, 2009.

See Exhibit 4 to Complaint, at pgs 1-2 (emphasis added). While the document purports to backdate the assignment to August 14, 2009, the language in the Specific Assignment is written in the present tense, a present action to assign the Pebble Creek Plaza Pad Loan at that point in time, namely September 28, 2011. As set forth above, the Assignor FDIC clearly states that it assigns to the Assignee BB&T all of Assignor’s rights, title and interests in the designated loan documents [which included the Pebble Creek Plaza Pad Loan documents].

Under fundamental principles of Nevada contract law and interpretation, the Court should

1 rely on the specific contract, namely the Specific Assignment. *See e.g. Shelton v. Shelton*, 119
 2 Nev. 492, 497, 78 P.3d 507, 510 (Nev. 2003) (holding that contract interpretation requires “not
 3 only the circumstances surrounding the contract’s execution, but also subsequent acts and
 4 declarations of the parties. Also, a specific provision will qualify the meaning of a general
 5 provision.”); *Ex parte Smith*, 111 P. 930, 935 (Nev. 1910) (“specific provisions relating to a
 6 particular subject, they will govern in respect to that subject as against general provisions
 7 contained in the same acts”); *see also* 11 WILLISTON ON CONTRACTS § 32:10 (4th ed.) (“Even
 8 absent a true conflict, specific words will limit the meaning of general words if it appears from
 9 the whole agreement that the parties’ purpose was directed solely toward the matter to which the
 10 specific words or clause relate.”).

11 Here, the only specific assignment is the one dated September 28, 2011. Therefore, there
 12 is evidence that AB 273 should be applied to this case, as the Specific Assignment occurred after
 13 the effective date of the statute. Consequently, the discovery requests at issue in the Motion are
 14 relevant, and this Court should order that Plaintiff provide full and complete responses to the
 15 same.

16 III. CONCLUSION

17 In sum, Defendants have diligently propounded discovery on relevant factual issues in
 18 this action, but Plaintiff has failed to provide complete and adequate responses. Defendants
 19 respectfully request that this Court enter an order compelling Plaintiff to provide full responses
 20 to the written discovery at issue in the Motion to Compel.

21 DATED this 16th day of October, 2014.

22 **KOLESAR & LEATHAM**

23 By _____

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham and that on the 16th day of October, 2014, I caused to be served a true and correct copy of foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL RESPONSES TO WRITTEN DISCOVERY** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Rule 5(D) of the Nevada Rules of Civil Procedure, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities.

Christ Colucci
An Employee of KOLESAR & LEATHAM

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